doubt appears trifling, but a great part of that which seems unimportant throws light upon the manners, fashions, tastes and feelings of the day, and therefore affords materials, which the future historian would find valuable in his estimate of character, which is after all the most important subject of historical investigation. We are glad that the fine city of Penn has found 'such an honest chronicler as Griffith;' but we trust that it will not prevent some other hand from giving a popular account, from its beginning, of one of the most judicious, happy and prosperous settlements, ever made in this or any other country.

ART. V.—*Law School at Cambridge.*

1. *A Lecture, being the ninth of a Series of Lectures, introductory to a Course of Lectures now delivering in the University of Maryland.* By DAVID HOFFMAN, Iur. Utr. Doct. Gottingen. Baltimore. July, 1832.
2. *Remarks on the Study of the Civil Law.* From the American Jurist, No. III. Boston. July, 1829.
3. *An Address delivered at the Dedication of Dane Law College in Harvard University, October* 23, 1832. By JOSIAH QUINCY, LL.D., President of the University. Cambridge, 1832.

We notice with pleasure the three pamphlets which we have placed at the head of this article, as promising evidences of an enlightened zeal in promoting the study of general jurisprudence, and particularly of the Roman Civil Law, in this country.

The first of these pamphlets contains one of the course of lectures on the various branches of the law, which the author has been delivering for a number of years to his students at Baltimore. The second, which appeared for the first time in the American Jurist, is a review of two foreign works on the Civil Law. The third is an Address by the President of Harvard University, delivered at the dedication of the Dane Law College. These three pamphlets, though they differ from each other in the special subject of which each of them treats, agree in spirit, in the great object to deliver the study of the Law from profes-

sional bondage, and restore it to its rightful place among the moral sciences. It is when addresses like these shall have produced their full effect on the public mind, that we may expect to see the law of the land studied, not to the exclusion of general jurisprudence, but as a part of it,—as a special branch of that science which has its root partly in history, and partly in philosophy, deriving, as it does, its substance and its spirit from the knowledge of man, as he is, has been, and ought to be.

The mode in which, until of late, the rising generation of lawyers in this country were initiated in the mysteries of their profession, sufficiently accounts for their want of acquaintance with general jurisprudence. The lawyer's office was considered not only as the training ground, where the young soldier of Themis is to be fitted for active service by the direction and example of a veteran in his profession; but it was resorted to, both as the primary school and the university, in which the student's education was to be begun and completed. Now it is true that the office is the best, nay the only fit place for acquiring that practical information, without which the most learned general jurist makes no figure in the arena of professional labor and competition. But this nursery of practical skill is not and cannot be a complete seminary of jurisprudence. It is vain to expect, that the most able and faithful student should gain in the office that fundamental and comprehensive knowledge of the law, without which the most consummate practical discernment still retains the character of a sort of instinct, which is useful chiefly in cases of common occurrence, but never conducts to a thorough understanding of the science. The scientific student, on the other hand, never rests until he has entered into the inmost nature of the law, as well as the general character of the cases to which it is applicable, and on this account is never at a loss to discern, in any case, the accidental accompaniments and the essentials; and to distinguish between those circumstances which afford ground for argument, and those which predetermine the decision. Such a knowledge of the law, which distinguishes the scientific lawyer from the empiric, cannot be derived from the office of a successful practitioner, but it requires an ample and judicious collection of men and books, such as a well organized law-school, or law-academy, is intended to comprise.

In Germany, the law-academy forms one of the four 'fac-

ulties,' or chief departments of a university. Ten or more professors or lecturers are employed in each of the principal seats of learning, in teaching the different branches of jurisprudence. There is a regular course of studies established, pointing out the succession in which each student, during a residence of three or four years at the university, has to attend to the different departments of the law. This system of instruction generally begins with three elementary courses, one on what is called the Encyclopedia of the Law, or a brief survey of all the departments of jurisprudence; another on the Law of Nature, or the philosophical elements of the science, and a third on the Institutes of the Civil Law. Then each department of the law is taught in succession, such as the Civil or Roman Law, and the statutes of the country, the Canon or Ecclesiastical, the Feudal, the Commercial, the Penal, the Political and International Laws; and the course ends with 'examinatoria,' and 'disputatoria,' on each of the principal branches, and with practical instructions in the established mode of proceeding in the court; and no one is admitted to the bar, or receives the degree of Doctor of Laws, without passing a thorough examination in all the departments of juridical learning.

In this country we have made at least a beginning in this European mode of giving instruction in the law by regular courses of lectures. Law-schools have been established, in different States, and considering the little time that they have been in existence, the number of students who resort to them is sufficient to prove, that the usefulness of these institutions begins to be more and more acknowledged. As yet, however, their funds are too small to make provision for instruction in every important part of the law. Teachers have been employed and books collected, in order to give to students of the law a more scientific acquaintance at least with those parts of jurisprudence, which are of more immediate and frequent practical application. These most practical parts of the law should indeed be the chief, but by no means the only subject of a system of instruction, that would deserve the name of a *liberal* law-education. In our law-schools, there is generally some provision made for other branches besides the common law of England, and that of the United States. But owing to the infancy of these establishments, there are still so many departments, each of which requires the labor of an individual, compressed within the appointment of one professor,

that it is impossible he should do more than give the bare outlines of each, such as form the substance of that course of lectures, which in German Universities is called the 'Encyclopedia of Jurisprudence.' This summary instruction in the various branches of the law is one of the most useful sources of information, particularly to the beginner, who would enter upon his course of study with a clear perception of the whole extent of the science, and a sound estimation of the comparative importance of each department. Besides this general information, and besides a scientific and practical instruction in the law of the land, which must always form the principal course, there are two departments, which, from their superior importance, require that special provision should be made for them in every Law-school. I mean the Commercial and the Civil Law. With regard to the first mentioned subject, it will be sufficient to quote a passage from one of the pamphlets, placed at the head of this article.* 'Commerce, as well internal as external, is ever, from its very nature, expansive and varying, in accordance with which, the principles of this branch of law necessarily vary and expand. That they may be well understood, and be diffused through the nation with a rightly grounded uniformity, nothing seems more important, than that the education of legal students should, in this respect, have the supervision and aid of some one of the greater lights of the law, whose exclusive duty it should be to lead their minds to take comprehensive and practical views of this complex subject, and to teach them, among its fluctuating interests, how to fix upon its sound and immutable principles.' From these general considerations, President Quincy urges the importance of adding to the other branches of instruction for which provision is already made in the law-school at Cambridge, that of Commercial Law.

With regard to the other branch of the law, which we have mentioned as deserving the especial regard of all the liberal promoters of jurisprudence in this country, we quote a passage from the 'Remarks on the study of the Civil Law.† 'While endeavoring to advance the *science* of law in our own country, particularly by means of law-schools and lectures on the *Common* Law, we ought at the same time to take care that the *Civil* Law should not be wholly neglected. We have just had an

* President Quincy's Address, page 25. † Page 25.

illustrious example of professional liberality in the donation made by our learned countryman, Dr. Dane, to the University of Cambridge, for the advancement of *American* law. And we earnestly hope, that some benefactor of equal liberality will soon be found, who will devote a portion of the well-earned fruits of an honorable life to a chair for the *Civil Law* in that ever-cherished institution. This would complete the department of jurisprudence in our university law-school, and at once give it the preference over every other.'

In the remarks which we shall add on the study of the Civil Law, we shall neither repeat the vague commendation that has been lavished on the excellence of its regulations; nor shall we enter into the warm and often puerile contention between the civil and common lawyers in England, about the comparative superiority of the objects of their professional predilection. Our chief aim will be to place the subject in its true light, and to aid those who wish to investigate it, by some practical suggestions.

The Roman Civil Law is now considered, by all competent judges, as the main spring of the authoritative law of Europe. It is, as Mr. Hoffman says, 'a source of authoritative law in France, Germany, Spain, Italy, Portugal, Turkey, Holland, Poland, the two Sicilies, Bohemia, Hungary, the Cape of Good Hope, Scotland, and England.' In England, where this simple truth struggled a long time for general reception, sound learning and impartial judgment have at last triumphed over national and professional prejudice. Those very principles, which were for some time urged by the partisans of the Common Law of England, as the grounds of its superiority over the Roman Civil Law, have been traced to this very source; to which their best lawyers and law-writers were obliged continually to resort for rules of decision on almost every subject, and more particularly in determining the nature of *contracts*, which, in civilized countries, must be the most fertile and ever-varying ground of claims and disputes among men. Mr. Hoffman justly observes, 'that English jurisprudence has been copiously supplied from the purest streams of the Civil Law, though but little, and a very reluctant acknowledgement has ever been made for the heavy debt thus contracted.' 'Though the Roman Law has not been extensively studied by the legal scholars of England, there have not been wanting those who perceived the narrow and technical features of the

Common Law, and the expansive and equitable character of its rival. Some, who are now engaged in the laudable exertion of abrogating the rigid and feudal refinements, so unsuited to the present age, and of supplying their place by doctrines found in other codes, have resorted mainly to the writings of the civilians; and even before this, several of their judges, as Hale, Holt, and especially Mansfield, had shown a liberal willingness to appeal authoritatively, in some cases, and with due respect, in others, to the Justinian Code. In the Ecclesiastical courts of England also, (whose jurisdiction, in many particulars, is similar to that of our court of Probate, or Orphan's court,) and in their courts of Admiralty, Exchequer, and Chancery, (the powers of the two former of which are exercised in this country by the United States' District and Circuit courts) the law has borrowed copiously from the Roman sources, not merely in matters of right, or general law, but in the formulæ and modes of procedure.'

Also in this country, which has inherited, together with the Common Law of England, its obligations to the Civil Law, the importance of the latter has of late been often set forth and generally acknowledged. It has been recommended to the judge and the student, by many of the most distinguished men in the profession. Mr. Duponceau, in his address delivered at the opening of the Law Academy at Philadelphia, urged its practical importance in this country, 'where the administration of the Civil and the Common Law is committed to the same Judges, and the same body of Jurists is called upon to practise both.' But as yet, we apprehend that the Civil Law is rarely or very superficially studied, either in this country or in England. This assertion, if it were questioned, might be easily proved from a number of publications on the subject; but unfortunately it is true to such an extent, as to require no proof at all.

Even a superficial knowledge of the doctrines of the Civil Law is sufficient to explain the fact, that while the vast fabric of the Roman empire was overthrown by the unsparing bravery of uncivilized nations, the Roman Law obtained authority in regions which the arms of Rome had never reached. Even those who subdued Rome became the voluntary subjects of its law, 'non ratione imperii sed imperio rationis.' The following brief, and of course meagre sketch of the principles contained in the great work of the emperor Justinian, the

Corpus Juris Civilis, may perhaps not be uninteresting to the general reader.*

The Civil Law is founded on the principle of natural right, *jus naturale*, in the sense in which the jurist Paulus takes it, when he explains it as that which is eternally right and good, *quod semper æquum et bonum est.*† From this natural right the Roman lawyers derive man's duties towards God, his obedience towards his parents and his country, the natural justice of self-defence, and the natural injustice of doing wrong to his fellow-beings.‡ Upon this natural law, are founded the three well known principles of justice: to live morally, to injure no one, and to pay what is due to every one.‖ Accordingly, in the title 'of the *rules of right*,' and in many other parts of the compilation, we find the principle, *quod ad jus naturale attinet, omnes homines æquales sunt*, 'as to the law of nature, all men are equal.'¶ Therefore slavery is considered as unknown, and contrary to natural right, though authorized by the common law or rather common practice of nations, which also authorizes wars, captivity, and servitude.**

But, though the Roman jurists admit the existence of the law of nature, they are aware of the uncertainty of man's condition, if there were no positive law. Hence the principle, 'we are servants of the law, that we may be free.'—The law however shall be the same to all, not calculated for the advantage of a few individuals.††

The only cause of the binding power of any law, positive regulation, or legal custom is, its being *the will of the people*, from whom all public authority emanates.‡‡ The words of the thirty-second law of the first book, and third title of the Digest, are the following; 'old customs are not unjustly observed as law; for, as *the laws themselves are binding on us for no other reason, than because they are instituted by the will of the people*: accordingly also, that, which the people have approved of without writing, will be binding on all. For

* In citing a number of passages of the Corpus Juris, we have followed the mode of quotation approved by Gibbon, as it is probably that which is most generally known amongst us. (History of the Decline of the Roman Empire, Vol. V. Chap. XLIV.)

† D. 1. 1. 11. ‡ D. 1. 1. 2 & 3. ‖ D. 1. 1. 10. § 1.
¶ D. 50. 17. 32. ** D. 1. 1. 4 & 5. Inst. 1. 2. § 1.
†† D. 1. 3. 8. ‡‡ D. 1. 3. 32. § 1. I. 1. 2. § 6. D. 1. 4. 1.

what is the difference, whether the people declare their will by suffrage, or by a uniform course of acting accordingly?' This passage of the jurist Julian, and others of the same description, being inserted in Justinian's compilation, prove, that the sovereignty of the people is fully acknowledged by that code, of which the Emperor solemnly asserts, that it does not contain any thing antiquated or inapplicable.*

It was the will of the people from which each emperor received his various powers; one of which was that of issuing statutes (*constitutiones*) which were binding on all during the life of the emperor who had issued them, just as the 'edicts' of the prætor from the early times of the republic were binding during the term of his office. After the decease of the Emperor, the Senate, from whom he received his office in the name of the Roman people, could 'rescind his acts.' Hence this imperial right of making statutes was not considered by the Roman jurists as amounting to an abolition of the supreme legislative power of the people; and the empire, in the eye of the law, continued a republic in form, although it was in fact swayed by the will of the successful leader of the Prætorian guards. The people never gave up, in a legal form, their sovereignty, but the successful candidate for the empire was invested with his various public functions in the name of the Roman people, by the Senate, who, ever since the time of Tiberius Cæsar, deliberated for the people in matters of election.† During the time of the earlier emperors those public functions, although they were conferred upon the same individual, were not given to him all at once, but each of them separately. But after the reign of Vespasian,‡ every new emperor was invested with all his public functions by the same decree of the Senate, which was then probably denominated *Lex Regia*, or *Lex Imperii*. That this is the true meaning of that much-disputed term seems evident, since the recent discovery of the commentaries of the jurist Gaius, who lived in the time of the Antonines. In unison with the above quoted declaration of the jurist Julian, 'that the laws are binding on us merely because they are the will of the people,' Gaius says,‖ 'it never has been doubted that the statutes of the emperor

* Const. Deo auct. §. 10. Const. Tanta. §. 10.
† Tacit. Annal. Book I. Chap. XIII. & Inst. 1. 2. § 5.
‡ Gai. Inst. Lib. I. § 5. ‖ Gruter's Inscriptions, No. 242.

are to be considered as laws, since the emperor himself receives his power by a law.' This fully explains the words of Ulpian, that 'the decrees of the Emperor have the power of law, since by the *Lex Regia*, which has been made concerning his government, the people have conferred upon him all their own government and power.'* These passages, to which many others might be added, seem sufficient to show that the *Lex Regia* was neither a mere invention of the compilers of the Justinian Code, as many have supposed, nor a regal law, like that of the Danish nation, by which they resigned all their rights forever to their hereditary sovereign. There is no trace of such a general national act in the history of the Roman Empire, and such a supposition is utterly inconsistent with the express acknowledgment of the supreme legislative power of the people, in the code of Justinian. On the other hand, all historical authorities support the position, that every time a new emperor was to be appointed, a *Lex Regia*, that is, a statute investing him with all his public functions, was passed by the Senate, acting as the representatives of the Roman people.

It is a fact very little known, but easy to ascertain, that the Roman jurists, from the time of the Emperor Augustus Cæsar to the commencement of the third century after Christ, maintained the great principle of equal rights, and of the sovereignty of the people, though they were in fact oppressed by monarchical power. Undaunted by the terrors of despotism, and insensible to its allurements, they dared to found their doctrine upon the principles of the old republic, which they still declared to be the rightful state of their commonwealth. Many of them fell victims in endeavouring to secure the remains of republicanism from the encroachments of the emperors, and an overbearing soldiery. Though the spirit of those great authors of the Roman Law had died away when the Justinian code was compiled from their works, yet the republican foundation of the imperial power was not omitted in the compilation. We are far from pretending that Justinian himself behaved as a representative of the people, or that his deducing his absolute power from their will was founded in truth. As to his *code*, in this respect, nothing is important but the reason he assigns for the legitimacy of the imperial power, in declaring

* Dig. 1. 4. 1 pr. § 1.

that it was founded in right, because of its being founded upon the will of the people. We have dwelt somewhat longer on this point, as the assertion of many English lawyers, that the Civil Law is infected throughout by the principle of the absolute right of the monarch, attacks the whole system, whose foundations, as we have shown, are truly laid in the will of the people.

As another proof of the despotic character of the Civil Law, a passage in the Digest * is frequently referred to, from which generally only the four ominous words are quoted, *princeps legibus solutus est*, 'the prince is released from the laws.' If this passage were to be understood in a general sense, it would contradict the law of Theodosius and Valentinian, inserted in the Code of Justinian,† in which the emperors declare themselves bound by the law, and their own authority dependent on that of the law. Without availing ourselves of the argument that might be drawn from the fact that the law inserted in the Code was made more than a hundred years later than that inserted in the Digest, and that the Code itself is a later work of Justinian than the Digest, we would only remark, that in case of an apparent contradiction, a jurist, before admitting it, is obliged first to ascertain whether one of the two laws may not admit of a stricter interpretation. Now the declaration in the Code in the above stated case is general, but that in the Digest, as we see from the inscription, was taken from a work of Ulpian on the *Lex Julia et Papia Poppoea*, a law enacted under Augustus Cæsar concerning childless marriages and celibacy, which went among its numerous commentators under the special name of *Leges*. This interpretation is rendered necessary by the latter part of the passage, the whole being as follows. 'The prince is exempted from the *Leges*, but the empress, although she is not exempted from the *Leges*, has the same privileges granted to her by the princes, which they themselves possess.' As it cannot be supposed that the princes made their wives sovereign like themselves, it is obvious that by the *Leges* from which the prince is exempted, nothing more can be meant than special enactments, which, like those concerning childlessness and celibacy, laid certain classes of persons under peculiar legal disadvantages, or prescribed certain forms for legal transactions.‡

* D. 1. 3. 31. † C. 1. 14. 4. ‡ C. 6. 23. 3.

The principles of natural justice, of which we have spoken, prevail throughout that part of Justinian's compilation, which contains the law of *private rights.* But the Emperors, in fixing by their statutes their own privileges, and particularly those of their Treasury, have not unfrequently abandoned these principles. Therefore the *public law*, contained in the imperial codes, is not deserving of particular study, unless it be in an historical point of view; and even in those countries, in which the Justinian law in general is in force, its political regulations are considered of no authority. It is in the law of private rights that the real worth of that code consists. These alone are taught in German Universities. This department of the Justinian legislation abounds with specimens of that scientific and practical reasoning, that precision in defining the principles of the law, and in construing and deciding the given case according to those principles, which made Leibnitz compare it with the works of the mathematicians, and which induced the framers of the French Code to advise the judge to consult it as written reason. We shall here exhibit a few characteristic features and principles of the law of private rights, contained in the code of Justinian.

The Civil Law is remarkable for its regard to reasons of equity and propriety. Many acts, though according to the strict forms of law, are declared to be unlawful and ineffective, from being adverse to moral feeling. The most celebrated of Roman lawyers, Papinian, says: 'such actions as cannot be done without violating piety, honor and respect, in short, as are against good morals, cannot be done at all.'* The same principles were expressed by the same great jurist, on his being required by the Emperor Caracalla to defend the murder which he had perpetrated on his brother Geta, as Nero had been defended by the philosopher Seneca. 'It is easier,' answered the lawyer, 'to perpetrate the murder of a brother, than to defend it.' And he paid with his life for the glory of this answer.

A very humane provision of the Civil Law prescribes, that a debtor, who, without his own fault, has become unable to satisfy his creditors, shall not be deprived of all he possesses; but shall be entitled to keep what is necessary to support himself.† The barbarous practice of imprisonment for honest debt is wholly unknown to the law of Justinian.

---

* D. 28. 7. 15. † D. 42. 3. 4. pr. 6. D. 50. 17. 173. pr.

Respecting the private sanctuary of the house of a citizen, the Civil Law does not allow any one to be forced out of his house, even to be brought to trial.*

Concerning matrimony, the Civil Law holds the principle of the equality of husband and wife, as well in regard to the respectful treatment they owe each other, as to the administration of the property which each of them possesses. As to the possessions of married persons, the law leaves to the wife the entire liberty to accord to her husband any share in the administration of her fortune, or none at all.

The same principles of equality prevail in the doctrine of hereditary succession. There exists no prerogative of the male, in preference to female relations, nor of the eldest son before his brothers and sisters. They all, if not excluded by the will of the deceased, are equally entitled by the law to share, according to the nearness of their relationship, his inheritance.†

It is not necessary to explain in this country the consequence of this truly republican principle of hereditary succession, which eradicates aristocracy by dividing and subdividing large estates. Those great possessions which, if kept together by the feudal law of inheritance, form the means of the preponderance of a few families over all the rest, become, if divided by succession according to the Civil Law, the foundation of the independence of the great majority of the people. If the opposition of the English barons to the Civil Law, which has rendered them so popular, was really influenced by patriotic motives, it cannot be denied, that this patriotism was admirably suited to their aristocratical interests. The very case which gave rise to the famous declaration of the English nobility at the parliament of Merton, was intimately connected with their hereditary principles.

Much praise has generally and very deservedly been bestowed upon the law of contracts, as regulated by the Roman Code. It is especially this part, which has induced lawyers and law-givers to consider the Civil Law as written reason. But in regard to this, as to many others, it is impossible, by quoting detached passages, to give a correct idea of the whole.

As to the study of the Civil Law, there is one thing

* D. 2. 4. 18. 21. † Nov. 118.

which we would recommend to all who engage in it. Their attention should be directed chiefly to the *Corpus Juris Civilis*, compiled by the emperor Justinian. The American student should of course attend more particularly to the general principles, and to those special parts of the Civil Law which, like the theory of contracts, are of a more immediate practical use. But he should study these principles from the *Corpus Juris* itself, rather than from the second-hand learning of civil law writers. There was a time when, on the continent of Europe, the commentators of the Justinian law, particularly the professors at Bologna in the twelfth and thirteenth centuries, who are celebrated by the name of *Glossatores*, were looked up to with a blind reverence, that can be explained only by the prevailing ignorance of the law, which covered the defects of its commentators. But the time when a practical lawyer could say, 'I would rather have the *Glossa* in my favor, than the text,' is gone by. The works of the great civilians of modern times, particularly those of the sixteenth century, among whom the French jurist Cujas occupies the first rank, have broken the spell, and introduced a sound interpretation of the Roman Law. A similar attempt at setting the disciple above the master, was made in the course of the last century in Germany, where the judgment of the courts was controlled by a number of practical writers, such as Stryck, Lauterbach and others. But a more accurate study of the law itself, aided chiefly by the recent profound researches into its history, by Hugo, Savigny, Loehr and others, restored once more the Justinian Code to that estimation on which its commentators had originally founded their own, and prevented them from supplanting its authority.

It is particularly necessary, to warn the student against placing implicit trust in the accounts which Common Law writers give of the doctrines of the Civil Law. Of the frequent inaccuracy of these statements, we will give a few specimens. A number of mistakes with regard to the Civil Law are found in the commentaries of Sir William Blackstone. He is particularly apt to mistake or misinterpret the Civil Law, where his judgment is biassed by his predilection for that of England. Thus, for example, he contradicts what we have before said of the essential equality between husband and wife, as recognised in the Civil Law. In his unfortunate attempt to show how 'great *a favorite is the female sex* with the law of Eng-

land,'* Blackstone labors hard to hide some of the apparent exceptions to these tender mercies of the Common Law, and especially that which consists in the good old English right of the husband, properly to chastise his wife. This precious relic of antiquity is presented by the ingenious commentator, done up in a Latin phrase, and he attempts to put it out of sight by throwing a strong light on the greater incivility of the Roman Law, which, according to him, allows the husband, for some misdemeanors, severely to flog his consort, and for others, to apply a moderate castigation. For this strong position he quotes, Nov. 117. cap. XIV. If the commentator had studied the whole *Novella*, and compared it with other passages,† even his moderate knowledge of the Civil Law would have enabled him to see the true meaning of the passage he quotes. Marriage, according to the Civil Law, is a contract which can be dissolved by the will of either husband or wife; but if it be dissolved without a just cause, the party that thus breaks off the connexion, forfeits a part of his property to the innocent party, and to their children; and the same penalty is incurred by him, whose criminal conduct furnishes a just cause of separation. Justinian, in Nov. 117, after enumerating the just causes of divorce, says (in chapter XIV. which Blackstone quotes,) that if the husband beat his wife, he shall forfeit to her a part of his property, but his misconduct shall not be a sufficient reason for the wife to break off the marriage, without incurring a loss of part of her property. From the fact then, that when the husband beats his wife, he loses a part of his property, without affording her a sufficient reason for divorce, Blackstone infers that the Civil Law allows the husband to beat his wife. With the same fairness he might have inferred that the Civil Law permits stealing, because it does not, like the law of England, command that a man shall lose his life for stealing.

In the law of Bailments, much credit is due to the talent of Sir William Jones, displayed in his celebrated essay on this subject. But his desire to find his own theory in the doctrine of the Civil Law, has occasionally prompted him to a forced and daring interpretation of clear passages, almost unequalled

* Commentaries, Book I Chap. xv.

† Particularly with Cod. 5. 17. 6. 8. and Nov. 22. cap. 15. pr.

in the history of criticism, even in the works of Anthony Faber. We would not impute to him the mistaken theory of the three degrees of guilt (*culpa*) which was supposed to prevail in the Roman law. This doctrine has received much light from the recent investigations of some German jurists, particularly Loehr and Hasse, who have satisfactorily shown the errors of the old theory, by a thorough and clear interpretation of the various passages of the Roman law relating to this subject. But Sir William Jones is to be blamed for setting aside the clear sense of the law, in order to find in it a confirmation of his own preconceived theory. We refer particularly to those provisions of the Justinian Law, which require of the *hirer* the highest degree of diligence in taking care of the thing he has hired; so that, if it should sustain any injury while it is in his possession, nothing can save him from indemnifying the letter, except his proving that the damage was caused by an inevitable accident.

Sir William Jones, in his 'Essay on the Law of Bailment,' maintains, on the contrary, that the Civil Law requires of the hirer not more than an ordinary degree of diligence, such as the generality of mankind use in keeping their own goods, but not the most exact care which the most diligent persons apply to their affairs. This opinion of Sir William Jones is considered as the true exposition of the Common Law, by Judge Story, in his able and valuable Commentaries on the Law of Bailments (Chap. I. § 39). Still the contrary opinion is maintained by Bracton, and in Buller's Nisi Prius, as well as by Lord Holt, in the case of Coggs and Bernard, where the Chief Justice decided, that 'the hirer is bound to the utmost diligence, such as the most diligent father of a family uses.' Sir William Jones combats this principle in the following manner: 'I will engage to show, by tracing the doctrine up to its real source, that the *dictum* of the chief justice was entirely grounded on a grammatical mistake in the translation of a single Latin word.'

'In the first place, it is indubitable, that his lordship relied solely on the authority of Bracton; whose words he cites at large, and immediately subjoins, 'whence it appears, &c.' Now the words, '*talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet*,' on which the whole question depends, are copied exactly from *Justin-*

ian,* who informs us in the *proeme* to his Institutes, that his decisions in that work were extracted principally from the Commentaries of *Gaius*; and the epithet *diligentissimus* is in fact used by this ancient lawyer,† and by him alone, on the subject of hiring: but *Gaius* is remarked for writing with energy, and for being fond of using superlatives, where all other writers are satisfied with positives, ‡ so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words *Theophilus* rendered more than literally, and *Bracton* transcribed; and thus an epithet, which ought to have been translated ordinarily diligent, has been supposed to mean extremely careful. By rectifying this mistake, we restore the broken harmony of the Pandects with the Institutes, which, together with the Code, form one connected work, and, when properly understood, explain and illustrate each other.'

These views of Sir William Jones are adopted and greatly applauded by Mr. Brown, in his 'Compendious view of the Civil Law.'—Can it be called 'a grammatical mistake,' that Lord Holt rendered these terms of the Justinian Code, '*diligentissimus paterfamilias*,' by the words, 'the most diligent father of a family,'—and not as Sir William Jones does, 'ordinarily diligent?' Is it possible to applaud the manner in which Sir William Jones takes advantage of a remark of Le Brun, about the energetic style of the jurist Gaius, to subvert the clear meaning of the words of that jurist? Sir William Jones speaks as if all the other passages of the Civil Law, except that by Gaius in D. 19. 2. 25. 7. and that of the Institutes 3. 25. 5., were in favor of his opinion. Yet he does not quote any other law but these, and speaks of the 'broken harmony of the Pandects with the Institutes,' which he means to restore by his ingenious interpretation. As to the broken harmony between the different parts of the Justinian compilation, we shall mark here the passages which relate to this question.

The above quoted passage of the Institutes says: that the hirer is bound to the utmost care; and nothing but the proof of an inevitable accident can secure him against paying dam-

* Bract. 62. b. Justin. Inst. 3. 25. 5. where *Theophilus* has ὁ σφόδρα ἐπιμελέστατος.

† D. 19. 2. 25. § 7. ‡ Le Brun, p. 93.

ages. The same is said in the passage of the Pandects by Gaius, which we have already cited; and every one who understands the technical language of the Roman Law, will find the same meaning expressed in D. 13. 6. 5. 15., a passage by the jurist Ulpian, whom Sir William Jones certainly cannot suspect for his proneness to the use of strong expressions. The same principle is expressed in the Code: 4. 65. 28.

Indeed, the whole theory of Bailment proposed by Sir William Jones, as founded upon the Civil Law, is essentially defective. But as this would not be the proper place for discussing the subject at length, it may be sufficient for those who are acquainted with it, to observe, that, according to decisive declarations of the Roman Law, the seller, the hirer, and the pawnee, who derive their obligation from contracts, intended for the mutual benefit of both parties—as well as the mandatary, who acts only for the benefit of the mandator, are accountable for the *slightest* neglect in the performance of their obligations, so that nothing but the proof of unavoidable accident can save them from indemnifying the injured party.

The idea that the whole doctrine of culpable neglect, in the Roman Law, rested upon a distinction between three degrees, that of gross, that of slight, and that of the slightest guilt (*culpa lata*, *levis*, and *levissima*), must excite suspicion in the mind of any unprejudiced student when he is informed of the fact that the term, which was supposed to designate the third degree of imputable neglect, occurs only once in the whole *Corpus Juris*.* In this solitary passage the term by which the omission of the greatest possible diligence was supposed to be designated, refers to a case in which a person is not answerable for every kind of neglect, but only for what he actually does, and not for anything he leaves undone.

The best aid in the interpretation of the code of Justinian is to be derived from the history of the Roman legislation. It is to this study, that the recent progress in juridical criticism in Germany is chiefly owing. But, to be truly useful, this study should aim at a more solid object than a mere acquaintance with the peculiar customs and ceremonies of the Romans. These curious antiquities may serve to entertain the learner, for awhile, but they are apt to lead his attention away from

* D. 9. 2. 44.

the chief object. Thus, in perusing the first of the three pamphlets now under review, we could not repress the thought that the author might have filled those pages which treat of the old forms of espousal, marriage, and emancipation, of names and surnames,—with more useful instruction concerning the nature and gradual development of those departments of the Civil Law. The history of its various doctrines is of the greatest importance for the interpretation of the Roman Law in that form which it assumed under Justinian, and in which it became the common law of the greatest part of the civilized world. Most of the English works on the Civil Law, while they relate some of its antique oddities with precision, betray not unfrequently a very defective knowledge of the history of its principles. In order to warn the student against blindly trusting the assertions of writers, who in other respects deserve the high estimation in which they are held, we will notice here some current mistakes of this description. Mr. Brown, in his Compendious View of the Civil Law, asserts that this law placed women under perpetual guardianship; and this assertion is repeated by other writers. He says, 'in placing women under guardianship at all ages, and in any situation, they offered an affront to the sex; and one surely irrational, superfluous, and insulting.'* Mr. Brown was not aware, that as early as the reign of the emperor Claudius, the principal case of guardianships over women was abolished,† and that not a trace of it is to be found in the Code of Justinian, which contains the only practical Roman Law.

Some writers speak of the extent of the paternal power according to the Civil Law, as if the old absolute dominion of the father had, in the lapse of more than one thousand years, undergone but inconsiderable changes; as if his power over the person of the child was still, in the time of Justinian, next to absolute; and as if all that the child acquired was the property of the father.‡ But the fact is, with regard to the person of the child, that the paternal right of correction is restricted to the purpose of education; and if the father should think a severer punishment necessary, he must deliver up the child to the competent judge, who shall, with the father's consent, decree the appropriate correction.¶

---

* Ch. II. † Gaius, Inst. Lib. I. § 157.

‡ Blackstone, Book I. Ch. XVI. 452.—Brown, Compendious View of the Civil Law, Ch. II. ¶ Code, 8. 47. 3.

With regard to the assertion that the unemancipated child was unable to acquire anything for himself, we can only say that those who make it must be unacquainted with the statutes of the later emperors, particularly Constantine and Justinian, in consequence of which everything that the child acquired was to be his own property, except what he received from his father (*peculium profectitium*).

Some writers speak of the ancient strict institution of marriage among the Romans, and of the three different modes of solemnizing it by *confarreātio*, *coemptio*, or *usus*,—as if at least the last mentioned form still existed in the practical Roman Law.* But all these ancient forms had disappeared long before the time of Justinian, whose code knows of no other kind of marriage than that which rests upon the simple consent of the parties, and the assent of their fathers, if they be still under the paternal power.† The assent of the tutor, and that of the mother were not required. Blackstone, to be sure, says, on the contrary, that 'the Civil Law required the consent of the parent or tutor at all ages.'‡ But the laws which he quotes‖ say only that the assent of those persons is required, to whose power (*potestas*) those who are to be married are subjected. Now neither the tutor nor the mother had over the children a full power, in the legal sense of the word. Besides, the word 'tutor' is wrong in this place; for, according to the Justinian Law, a tutor can be appointed only for young men under fourteen, and women under twelve years of age, and these are not allowed to marry at all. Persons over this age had a *curator* appointed to them, to take care of their property, but they could dispose of their own persons, and marry without asking the curator's advice.¶ Also the additional remark of Blackstone, that 'the consent of the mother or guardians, if unreasonably withheld, might be redressed or supplied by the judge or the president of the province,—rests on a partial misunderstanding of the laws he quotes.** These laws say, that if there are several suitors of a girl who has lost her father, and she, from feelings of modesty, does not wish to choose between them, but leaves the decision to her mother and guardians, and these cannot agree, the judge or the governor of the province, together with the nearest relations, shall decide the question.

---

* Brown, Ch. II. eod.
† D. 23. 2. 2.
‡ Book I. Ch. XV. 437 & 438.
‖ D. 23. 2. 2. & 18.
¶ D. 23. 2. 20.
** Book I. Ch. XV. 438. Cod. 5. 4. 1. 20.

A mistake, both against the history of modern Europe and the principles of the Roman Law, is contained in a work of high merit, the Commentaries of Chancellor Kent.* He maintains that the system of community of estate between husband and wife, which prevails in many parts of Europe, is founded on the Roman Civil Law. 'I do not allude,' he says, 'to the earlier laws of the Roman republic, by which the husband was invested with the plenitude of paternal power over the wife, but to the Civil Law in the more polished ages of the Roman jurisprudence, when the wife was admitted to the benefit of a liberal ante-nuptial contract, by which her private property was secured to her, and a community of estate between the husband and wife introduced.'

The system of community of estate between husband and wife, which prevails in many parts of Europe, is founded upon German customs and statutes, and not upon the Roman Civil Law. The old strict institution of matrimony, by which the husband obtained a kind of paternal power, (*manus*) over his wife, was gradually displaced by the more simple form of marriage, which is the only one acknowledged by the Justinian Law. According to this law, the wife remains the sole proprietor of all she possessed before her marriage, without being obliged solemnly to reserve it by ante-nuptial contracts. The husband has not even the administration of this property, unless the wife has committed it to him by a special contract.† Accordingly, in those parts of Europe, in which that communion of property is considered as the legal consequence of marriage, the Roman Law, though the common law of the land, is considered inapplicable, so far as its regulations are at variance with the more particular Provincial or Municipal Law.

In treating of the relation between master and slave, Mr. Hoffman‡ mentions 'intellectual inferiority,' as one of the acknowledged sources of slavery; although there is no foundation for this assertion in the Roman Law. He also mentions 'paternal power;' although, even in the earliest times of Rome, the son, in his father's power, though he could be sold into slavery, was not a slave, but a citizen as well as his father, and as such could hold the highest office in the republic, without ceasing to be subject to his father's power.

---

* Vol. II. Part. IV. Lecture XXVIII.

† Cod. 5. 14. 8. ‡ Lecture, page 38.

Mr. Hoffman very justly omits another cause of slavery, imputed to the Civil Law by Sir William Blackstone.* Among the 'three origins of the right of slavery, assigned by Justinian,' he mentions, in the second place, that 'slavery may begin "*jure civili,*" when one man sells himself to another.' The passage in the Institutes which he quotes says, 'that a free man above twenty years of age becomes a slave, by force of the law, if he suffers himself to be sold in order to share the price.' If this passage really declared what Blackstone understands by it, that a man can 'sell himself to another and become his slave by force of the contract,'—the remarks which he makes upon this monstrous and absurd contract would be well grounded: that no price can be an equivalent for personal freedom; and that even the object of the self-sold slave, to share the purchase money, would be defeated by its becoming the property of his master. But it seems strange that this last consideration of the absolute inefficacy of a sale made for the purpose of sharing the price, should not have raised in the mind of the ingenious commentator some doubts as to the accuracy of his interpretation. The Roman legislation is certainly not chargeable with a propensity to lay down rules for bargains, which the common sense and self-interest of people would prevent them from ever making. The law does not speak of a person selling himself, but of one suffering himself to be sold by another, in order to share with him the purchase money. The law allowed every one who had been sold into slavery to vindicate his liberty by the aid of the Prætor, by showing that he is by right a freeman, and thereby to annul every contract in consequence of which he is held in bondage. Some persons, availing themselves of the letter of this law, suffered themselves to be sold by others; the purchaser was made to believe that the seller was the master of the person sold; and this one, after being delivered to the deceived buyer, availed himself of the law, proved his freedom, and being liberated by the Prætor, divided with the seller, the associate of his fraud, the purchase money. To prevent such fraudulent transactions, the law declared that he who suffered himself to be sold by another for the purpose of sharing with him the price after having recovered his liberty, should forfeit the benefit of the law,—the claim

* Book I. Ch. XIV. 423 and 424. The same assertion is repeated in Kent's Commentaries, Vol. II. Part IV. Lecture XXXII.

of liberty (*provocatio in libertatem*) should not be granted to him, but he should remain a slave in consequence of his fraud. The fraud then, and not a contract, (a supposed sale of himself) was the ground of that case of slavery which Justinian says arises *ex jure civili*, that is, in consequence of a law of the Roman state. It seems as if an attentive examination of the simple passage of the Institutes which he quotes, could not have failed to convince Blackstone of his mistake. Other passages, for example, the seventh law of the twelfth title of the fortieth book of the Digest, in which Ulpian treats of this case more at large, were probably unknown to Blackstone.

These remarks may be sufficient to show the importance of a careful interpretation of the Civil Law, and the necessity of discriminating, with historical accuracy, between the different periods of Roman legislation. It is indispensable to a mutual understanding on this subject, that in referring to regulations of the Civil Law, particularly for a practical purpose, we should not indiscriminately mix up the principles received at different periods of the Roman legislation, which was continually changing, during more than twelve centuries, from the law of the twelve tables to that of Justinian. Whenever we have occasion to appeal to the Civil Law, as an authority to be consulted on questions which the law of the land has left undecided, we should confine ourselves to the Code of Justinian, and the reasoning of Civil Law writers, founded upon its principles.

In pointing out and criticising a number of assertions concerning the Civil Law, in order to show the importance of a more profound inquiry into this subject, we have felt encouraged in our critical freedom by the fact, that the authors from whom we have quoted are of such great authority and merit, that their just credit cannot be impaired by the detection of error in some of their remarks on a subject, to which they have been able to devote but a small part of their valuable time. It is a subject too, on which one who has received a regular theoretical and practical education in the Civil Law, though possessed of only an ordinary degree of information, must be enabled, through the learning of his teachers (*præceptores nostri*, as Gaius says) to impart some useful knowledge to the most learned lawyer, who has grown up and risen to eminence under a different system of jurisprudence. And as we go on the principle, that an uncompromising criticism ought to begin

with our friends, we have selected the subjects of ours from the writings, not of the detractors, but of some of the warmest and most judicious admirers of the Civil Law.

To promote the study of the Civil Law, some of the most important German works, such as that of Savigny on the Right of Possession, and Hugo's History of the Roman Law, have lately been translated in France and in England. Perhaps the most useful work for the student would be a translation of an elementary book, for example, the Institutes of the Roman Law, by Mackeldey, a work in which the results of the learned investigations of the last forty years in this department are exhibited in a condensed form, yet with great clearness. In a number of German universities the work of Mackeldey has superseded that of Heineccius, which, notwithstanding its eminent merit, is less useful from the circumstance of its having been written before the recent researches into the history of the Roman Law had thrown light on many complicated and obscure doctrines. Any reader, possessed of an ordinary degree of knowledge of history and the Latin language, after having studied thoroughly the forty-fourth chapter of Gibbon, may study Mackeldey with advantage. By reading the well selected passages of the Justinian code, to which the author refers, he will acquire a general knowledge, sufficient to enable him not only to understand, but justly to estimate, any larger work, or more minute treatise, on the Civil Law. But as long as we cannot resort to a later elementary work, that of Heineccius, together with the Institutes of Justinian, will give to every student a competent fundamental knowledge. 'The Institutes,' as Chancellor Kent observes,* 'should be read in course, and accurately studied with the assistance of some of the best commentaries.' That of Vinnius, perhaps the most common amongst us, is also one of the best commentaries on the Institutes of Justinian.

We have attempted, in the present state of general excitement on questions of constitutional law and politics, to direct the public attention to the *law of private rights*, and particularly the Roman Civil Law, as the principal source from which we may derive means of improving this department of legislation and jurisprudence in our country. While there is contention all around us, about the rights of the States, and

* Commentaries, Vol. I. P. III. Lect. XXIII.

the constitutional attributes of the General Government, those at least who have made the study of the law their calling, should be zealous to consult the legislative wisdom of all countries and ages, in order to define and secure the *rights of individuals*, remembering that the safety of these is the great final object of every civil constitution, of all legislation and public administration.

ART. VI.—*The Progress of Society.*

Idées sur la Philosophie de l'Histoire de l'Humanité par Herder: ouvrage traduit de l'Allemand et précédé d'une Introduction. Par EDGAR QUINET. 3 vols. 8vo. Paris. 1827.

The present is a revolutionary age. The political elements seem every where in motion:—and all are busy, either as actors in, or spectators of, the great work, as it is called, of Reform. And while new revolutions are in progress, old ones are becoming the themes of conversation, and the subjects of research. Men are going back to the ancient battle-fields of their fellow men,—studying the principles, which gave birth to their uprisings,—noting the connexions of remarkable events,—and writing the lives of the leaders of revolutions. All this is natural, and it is well. We rejoice in the interest, which men are taking in the history of past revolutions. The inquiry will furnish encouragement for the future. We have a view, in regard to past revolutions, which makes us believe, that the more recent ones are for good. And we have selected the work whose title stands at the head of this article, for the purpose of speaking of the view, with which we would have the history of past revolutions written and read.

The object of history is not merely the recording of facts. The world,—as its distant and widely extended climes, with their peculiarities of situation and climate, make together one great whole,—so the events that have happened in it, which are happening, and which will happen, are closely linked together, and interwoven, as it were, into one unbroken thread. The past has had its influence in forming the present. The present is operating mightily upon the future. The